



Calculating an Employee's Family and Medical Leave Entitlement

Pursuant to federal law and our state personnel regulations, an employee with a qualifying condition is entitled to twelve (12) workweeks of family and medical leave per calendar year. 29 CFR § 825.200; 101 KAR 2:102, Section 3 and 101 KAR 3:015, Section 3.

1. Continuous Family and Medical Leave

When an employee uses family and medical leave continuously, calculation of this entitlement is simple. For example, an employee regularly scheduled to work 37.5 hours per week is entitled to 450 hours of family and medical leave. (37.5 hours per week x 12 workweeks= 450 hours). Similarly, an employee regularly scheduled to work 40 hours per week is entitled to 480 hours of family and medical leave. (40 hours per week x 12 workweeks= 480 hours).

2. Intermittent Family and Medical Leave

When an employee uses family and medical leave intermittently, calculation of the employee's entitlement is more complex. If the employee has worked overtime within the twelve (12) months prior to the beginning of the leave period, then the employer must consider the overtime worked in calculating the employee's family and medical leave entitlement. Specifically, with respect to this issue, the federal Family and Medical Leave Act (FMLA) regulations provide as follows:

When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement.

If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

29 CFR § 825.205(b).

In other words, if an employee's medical certification indicates that the employee requires intermittent family and medical leave, the employer must look back over the twelve (12) preceding months to determine the average weekly hours the employee worked and was on paid leave, including holidays. The "Paid Hours" variant in KHRIS can be used to calculate an employee's average weekly hours.

For example, in general, if the employee was scheduled to work on average 37.5 hours per week over the preceding twelve (12) months, then the employee is entitled to 450 hours of family and medical leave. However, if, on average, the total number of hours the employee worked and was on paid leave, including holidays, is 50 hours per week over the preceding twelve (12) months, then the employee is entitled to 600 hours of family and medical leave. (50 hours x 12 workweeks = 600 hours). An employee's election to reserve accumulated sick leave pursuant to 101 KAR 2:102, Section 3(6)(b) or 101 KAR 3:015, Section 3(6)(b) would not affect this analysis.

HOWEVER, under no circumstances should an employee's family and medical leave entitlement drop below 450 hours in the case of an employee regularly scheduled to work 37.5 hours per week, and 480 hours in the case of an employee regularly scheduled to work forty (40) hours per week.

Currently, KHRIS is unable to track an employee's intermittent family and medical leave entitlement in the event that the employee works on average more hours than he or she is regularly scheduled to work. As a result, an employer must keep track of the exhaustion of this entitlement manually outside of the system. For example, an employer could track use of an employee's family and medical leave entitlement on an employee's printed timesheets. In accordance with federal regulations, an employer must keep all records pertaining to its obligations under the FMLA for a period of at least **three (3) years**. 29 C.F.R. § 825.500(a).

3. Intermittent Leave and Overtime

With respect to overtime (additional hours), the federal FMLA regulations provide as follows:

If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave.

29 CFR § 825.205(c). For example, assume that an employee regularly scheduled to work forty (40) hours per week presents FMLA certification indicating that the employee is unable to work more than forty (40) hours per week. In that case, any overtime that the employer would otherwise schedule the employee to work may be counted against the employee's family and medical leave entitlement. Therefore, if a forty (40) hour employee would have otherwise been scheduled to work an additional mandatory overtime shift of eight (8) hours during a workweek, then the employer may count those eight (8) hours against that employee's family and medical leave entitlement.

4. Continuous Leave followed by Intermittent Leave

Agencies may face a situation whereby an employee initially uses family and medical leave continuously, returns to work, and then proceeds to use family and medical leave intermittently. For example, assume an employee has an operation requiring continuous family and medical leave for three (3) weeks. Thereafter, the employee returns to work on a part-time basis, using family and medical leave intermittently. Under those circumstances, the employee's family and medical leave entitlement should be calculated as follows:

While on continuous family and medical leave, the employee exhausted three (3) weeks of her twelve (12) week family and medical leave entitlement. As a result, the employee is entitled to nine (9) additional weeks of family and medical leave. Since the employee has returned to work and is using family and medical leave on an intermittent basis, the employer must look back over the twelve (12) months preceding the beginning of the employee's family and medical leave to determine, on average, how many hours the employee worked and/or was on paid leave, including holidays, per workweek.

- If the employee's average workweek consists of 37.5 hours, then the employee would be entitled to an additional 337.5 hours of family and medical leave during the remainder of the calendar year. (37.5 hours x 9 workweeks = 337.5 hours of family and medical leave).
- If the employee's average workweek consists of forty (40) hours, then the employee would be entitled to an additional 360 hours of family and medical leave during the remainder of the calendar year. (40 hours x 9 workweeks = 360 hours).
- If the employee's average workweek consists of fifty (50) hours, then the employee would be entitled to an additional 450 hours of family and medical leave during the remainder of the calendar year. (50 hours x 9 workweeks = 450 hours).

5. Intermittent Leave followed by Continuous Leave

Further, agencies may face a situation whereby an employee uses family and medical leave intermittently initially, then proceeds to use family and medical leave continuously.

Assume an employee (regularly scheduled to work 37.5 hours) has a back injury which requires intermittent family and medical leave. In order to calculate the employee's intermittent family and medical leave entitlement, the employer must look back over the twelve (12) months preceding the beginning of the employee's family and medical leave. The employer must determine, on average, how many hours the employee actually worked and/or was on paid leave, including holidays, per workweek during this period. If the employee's average workweek consists of fifty (50) hours, then the employee would have an entitlement of 600 hours for purposes of intermittent family and medical leave. (50 hours x 12 workweeks = 600 hours of family and medical leave).

Assume the employee exhausts fifty (50) hours of the employee's family and medical leave entitlement by May 31. Thereafter, on June 1, the employee requires continuous family and medical leave for surgery and recuperation. Under those circumstances, the employer must convert the employee's remaining hourly entitlement to workweeks to determine how long the employee is entitled to remain out of the office on continuous family and medical leave as of June 1.

Therefore, if the employee has used 50 hours of intermittent family and medical leave, then the employee's balance of leave would be 550 hours. (600 hour entitlement – 50 hours used = 550 hours remaining). The employer must convert the employee's remaining hourly entitlement to workweeks. Since the employee's average workweek consists of fifty (50) hours, then the employee would be entitled to an additional 11 weeks of family and medical leave (at the regularly scheduled rate of 37.5 hours per workweek) during the remainder of the calendar year. (550 hours remaining / 50 hours = 11 workweeks).

6. Multiple Qualifying Conditions

Agencies may face a situation whereby an employee has multiple FMLA-qualifying conditions in one calendar year. Under those circumstances, similar to the examples outlined above, the employer should calculate the employee's hourly family and medical leave entitlement by looking back over the twelve (12) months preceding the beginning of the employee's family and medical leave. The employer must determine, on average, how many hours the employee worked and/or was on paid leave, including holidays, per workweek during this period. In other words, the employer calculates this average based upon **the first date the employee uses family and medical leave within the calendar year, regardless of the qualifying condition.**

Example:

An employee requests intermittent leave for migraines beginning February 1. Thereafter, the employer must determine, on average, how many hours the employee worked and/or was on paid leave per week in the previous twelve (12) months. If employee requests intermittent leave for a separate condition (e.g., to care for a qualifying family member) on May 1, the employer should not recalculate the employee's hourly entitlement based upon the employee's average workweek twelve (12) months immediately preceding May 1. Instead, the average workweek in the twelve (12) months immediately preceding February 1 is still the determinative factor. Otherwise, the average workweek would be skewed by unpaid family and medical leave taken during the period of February 1 to May 1.

A complete copy of 29 CFR § 825.205 may be accessed by clicking [here](#).